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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

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| THE PEOPLE,<br>Plaintiff and Respondent,<br>v.<br>ELBRICK PASAYES ALBIZURES,<br>Defendant and Appellant. | A141488<br><br>(Napa County<br>Super. Ct. No. CR165693) |

Elbrick Pasayes Albizures was charged and convicted of one count of rape by force or fear (Pen. Code, § 261, subd. (a)(2))[1] and one count of sexual penetration by force or fear (§ 289, subd. (a)(1)(A)). On appeal, Albizures argues: (1) substantial evidence does not support the jury's implicit finding that he acted with the requisite intent; (2) the trial court abused its discretion in excluding evidence of the victim's prior conviction; (3) the trial court erred in giving a "biased" consciousness of guilt jury instruction; (4) the trial court erred in failing to instruct the jury that, in order to convict, it must find circumstantial evidence irreconcilable with innocence; and (5) cumulative error. There is no merit in Albizures's arguments. Accordingly, we affirm.

## I. FACTUAL AND PROCEDURAL BACKGROUND

Because sufficiency of evidence to support the verdict is at issue, we present a somewhat detailed summary of the evidence presented at trial. It is undisputed that on April 13, 2013, Jane Doe and Albizures engaged in sexual acts during a massage at the

[1] Undesignated statutory references are to the Penal Code.

Villagio Inn and Spa (Villagio), in Napa Valley. The People's theory was that Doe did not consent and that Albizures accomplished the acts by force or fear. Albizures, on the other hand, maintained Doe consented.

*Prosecution Case*

In 2007, Doe was diagnosed with multiple sclerosis. As a result, she suffers body pain and sometimes walks with a cane. Doe, who was 5 feet 9 inches tall, stated she had been receiving massages at the Villagio approximately two to four times a year for eight years. She usually requested Albizures because his massages were gentle enough to not cause her pain, he allowed her to sleep during a massage, and he had never been inappropriate. She had told him about her illness.

It was customary for Doe to undress before Albizures entered the room and thereafter be draped with only a sheet. During the massage, she was either lying face down with her head in a cradle or on her back with a small towel under her head and an eye mask over her eyes. Generally the massage treatment relaxed her, and she often went to sleep. Once, in 2011, Albizures kissed her on the forehead after a massage.[2] She told him, "don't do that shit again," but later felt she had overreacted.

In April 2013, Doe was in a relationship, but the relationship was not necessarily exclusive. Doe's boyfriend usually arranged and paid for her spa visits because he knew the Villagio's general manager. On the occasion of April 13, 2013, however, Doe's cousin arranged for herself, Doe, and another girlfriend to celebrate Doe's birthday at the Villagio. A full day was planned. Doe's boyfriend and the three women were to have breakfast at the Villagio. Then, while Doe's boyfriend attended a funeral, each of the women would have a massage, followed by an hour of extra relaxation at the spa, wine tasting, and then dinner.

On April 13, 2013, Doe did not take any of her prescribed pain medicine because she knew she would be having wine. As planned, the four had breakfast, with mimosas, at the Villagio. Doe had "a couple of sips, but not the whole glass." The group then went

[2] Doe remembered the kiss a month before trial.

to a "champagne sabering" hosted by an acquaintance of Doe's boyfriend. Doe was again given a glass of champagne, but did not finish it. Afterwards, Doe went to the spa where she greeted Albizures.[3]

Albizures and Doe went up the stairs to the spa suite where Doe was to receive her massage and the women were to later have their relaxation time. Albizures left Doe alone to undress. She got under the sheet on the massage table and Albizures returned. The massage began with Doe laying on her stomach. She went to sleep. At some point, Doe turned over onto her back. Albizures put a mask over her eyes and massaged her arm and leg on one side of her body, then came around to the other side. She felt relaxed and went back to sleep.

Albizures was massaging her right leg when, suddenly, Doe felt Albizures insert a finger or fingers into her vagina. She felt Albizures's other hand on her wrist. Doe put her own hand between her legs, pushed Albizures's hand away, and said, "What the fuck?" When Doe pushed Albizures's hand away, she felt tension in his wrist. Afraid that he was making a fist and might strike her, she let go.[4] She "froze." She explained: "I left his hand there, I have no idea what the hell he's doing. I don't know. I[']m just mentally just not here. I just shut it down. [¶] . . . [¶] I don't feel like I can move my body. I feel frozen, like I cannot get up, I cannot jump, I cannot move, I cannot run. I just feel frozen. My body won't move." She further explained: "[I] [j]ust shut down. It's a childhood defense issue. I don't know if I want to anger him."

Next, Albizures picked up Doe's right hand and placed it on his uncovered penis. She quickly removed her hand.[5] The room got quiet and she thought Albizures was leaving. Instead, Albizures pulled off the sheet covering Doe, got on the massage table,

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[3] Doe previously told an investigator she greeted Albizures by giving him a hug and asking about his children. She denied asking about his children at trial.

[4] Doe previously told an investigator that Albizures had said, "I thought the pressure was okay."

[5] In prior discussions with an investigator, Doe was "kind of back and forth" on whether she had touched Albizures's penis with her hand.

and penetrated her with his penis. She did not remove her eye coverings, as she still felt unable to take action. She felt the weight of his body on her chest. She pushed down on Albizures's shoulders with her hands, and grunted "get out."[6] Albizures continued thrusting and, eventually, ejaculated and got off the table. Doe sat up and saw semen on her stomach, which Albizures wiped off. Albizures left the room, after saying, "[Y]ou're five minutes over your session, no hard feelings."

Doe opened the suite door and saw her cousin and friend in a nearby lounge area; she motioned for them to come into the suite. Doe immediately said, "something bad happened" or "some things weren't right." Doe testified, "[they] just really just kind of dismissed what I said and just went out to the Jacuzzi tub." Instead of going to the tub with the other two, Doe took several showers. Approximately 30 minutes later, Doe said she had been raped. Doe's cousin and friend tried to find out exactly what had happened, but Doe was unresponsive. Doe asked her cousin not to mention the incident to Doe's boyfriend because he had a business affiliation with the Villagio and because she did not want to ruin the day. When the group left the spa, Doe's cousin paid the $400 bill without protest.

Based on Doe's unusual response to a text message, Doe's boyfriend assumed something was "not right." When the group went wine tasting, Doe did not participate. Doe's boyfriend asked what was wrong and Doe said, "[Albizures] was so inappropriate, I don't know where to start." An hour after arriving home, Doe called her boyfriend and told him Albizures raped her. She indicated she would call the Sheriff's office, but Doe's boyfriend made a call, after which she received a call from the Sheriff's office.

Detective Chris Pacheco was assigned to investigate Doe's allegations. Doe's cousin told Pacheco that pictures had been taken throughout the day on Doe's phone. When Pacheco requested the photos, Doe e-mailed 12 photos to him, only two of which had been taken after the spa session. Doe testified she did not delete any photos. Her

[6] When Doe first reported the allegations, she said she was in shock and said nothing. She told a different investigator the following day that she had said "no."

cousin did. In the past, Doe had shared her experiences at the Villagio, and photos taken there, on social networks. On April 18, 2013, Pacheco learned Doe had deactivated her Facebook account sometime after his first meeting with her.

On April 14 and 15, detectives arranged several "pretext calls" between Doe and Albizures, recordings of which were played for the jury. During the first call, Doe expressed her concerns that Albizures get tested for genital herpes. Albizures seemed to know what she was talking about. They agreed "this will never happen again." Doe asked why it happened, and Albizures said that he could not explain it. He thought she wanted it. When asked why he thought that, he said it was a hard question, and they ended the call because he was with his family. They agreed she would call another time.

During the second call, on April 15, Doe said she did not "ask for it" and expressed her anger. He replied that he was sorry "for what [he] did to [her]" and again said he could not explain why it had happened. "It just went to another, you know, another level . . . ." Albizures also mentioned that he had been told not to come to work that day and said more than once that he was "freaking out." Doe accused him of raping her and hung up after he said, "I'm sorry?" Doe called back immediately. Albizures said he did not want her to be mad at him, but did not affirmatively dispute her characterization and apologized again. Doe asked if she had ever flirted with him. The call ended after he answered that he thought she had been a little flirtatious the previous year.

On April 15, Detective Nicol Dudley interviewed Albizures. A video recording of the interview was played for the jury. It was mostly a preview of Albizures's testimony at trial, although in the interview he initially stated that Doe had grabbed his hand and placed it on her vagina, had unzipped his fly, and that she reached for his penis. Albizures later acknowledged embellishing his story with these details.

*Defense Case*

Albizures testified in his own defense. He had been married for five years and had never before been unfaithful. He had two children, aged two and six. He worked as a massage therapist at the Villagio for 10 years. He knew he could lose his license or job if

he had even consensual sex with a client. The result would be virtually no income for his family. He had already missed two and one-half months' work due to recent illness. Influenza had turned into pneumonia, followed by heart trouble and surgery to place a pacemaker. Albizures was 5 feet and 1 inch tall and weighed 135 pounds.

Albizures described Doe as "very friendly." She usually greeted him with a hug and asked how he was doing. She often addressed him by name or as "Babe."[7] However, Albizures had never previously kissed Doe.

On April 13, Doe hugged him, introduced her cousin, and asked about Albizures's children. During the massage, Doe was breathing heavily and moaning. As he massaged her legs, she opened her legs in a way that required him to use "a block so she wouldn't open them too far." He proceeded to massage her hands, then, as was customary, began massaging the portion of the pectorals above Doe's breasts. Doe moved her arm, which exposed her breast. He accidentally touched her breast, and the same happened when he moved to the other side.

At some point, Doe asked Albizures if she could touch herself. He did not respond, but she began masturbating. With her other hand, she grabbed him by the forearm and continued moaning. He first tried to free himself, but instead began touching her genitals himself. Doe did not ask him to stop or take any action indicating she wanted him to stop. With his other hand, Albizures opened his fly and guided Doe's free hand to touch his penis. She did not protest any of these actions, and she stroked his penis firmly. Eventually, the small towel and eye pad covering her eyes fell off. He moved his body closer to the part of the table where her head was, and she performed oral sex for a few minutes. She said, "I want you to come on my breast." Doe then told him to get up onto the table, which he did. They had intercourse, during which she crossed her legs behind his back. After two or three minutes, he pulled out and ejaculated on her

[7] Although at first denying it, Doe agreed she called Albizures "Babe" during recorded phone calls. She got into the habit of calling people "Hon" and "Babe" when working as a flight attendant.

stomach, which he cleaned up with the cloth that had been over her eyes. He was not thinking about his career or his family, and as soon as it was over he started feeling bad about what happened. Albizures asked if Doe was okay, she assured him she was and said, "that's what I wanted last year." They had a brief exchange about refreshments arranged for Doe and her companions. Albizures apologized for not being able to complete the massage.

With respect to the pretext calls, Albizures explained his silence in the face of Doe's accusation as due to the fact that she hung up before he could deny the allegation. He apologized to Doe because she was upset, not because he was guilty.

Another Villagio massage therapist described Albizures's temperament as very quiet, introverted, and professional. The massage room had very thin walls, as well as doors to another massage room next door and to the outdoor area. A conversational tone would carry to the adjoining room, and so it was customary to speak in a low voice. Even asking the client to turn over could be heard next door, where Doe's cousin had been receiving a treatment at the same time.

A long term client and friend testified Albizures had massaged her about 20 times and had never been inappropriate. On April 13, 2013, Albizures massaged her after Doe. He seemed distracted.

*Verdict and Sentence*

The jury returned verdicts finding Albizures guilty on both counts. Albizures was sentenced to three years in state prison and filed a timely notice of appeal.

## II. DISCUSSION

As previously noted, Albizures argues on appeal: (1) substantial evidence does not support the jury's implicit finding that he acted with the requisite intent; (2) the trial court abused its discretion in excluding evidence the victim had been previously convicted of a misdemeanor; (3) the trial court erred in giving a "biased" consciousness of guilt jury instruction; (4) the trial court erred in failing to instruct the jury that, in order to convict, it must find circumstantial evidence irreconcilable with innocence; and (5) cumulative error. We find no merit in any of his arguments.

A. *Substantial Evidence*

First, Albizures contends there is no substantial evidence he intended to use force or fear to accomplish either digital penetration or sexual intercourse. When faced with such a challenge, "the court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Johnson* (1980) 26 Cal.3d 557, 578; see *Jackson v. Virginia* (1979) 443 U.S. 307, 318–319.)

"A reviewing court must accept logical inferences the [fact finder] might have drawn from the circumstantial evidence. [Citation.] ' "A reasonable inference, however, may not be based on suspicion alone, or on imagination, speculation, supposition, surmise, conjecture, or guess work. [¶] . . . A finding of fact must be an inference drawn from evidence rather than . . . a mere speculation as to probabilities without evidence." ' " (*People v. Sifuentes* (2011) 195 Cal.App.4th 1410, 1416–1417.) We will not substitute our evaluation of witness credibility for that of the trier of fact. (*People v. Koontz* (2002) 27 Cal.4th 1041, 1078.) "Where the circumstances reasonably justify the trier of fact's findings, a reviewing court's conclusion the circumstances might also reasonably be reconciled with a contrary finding does not warrant the judgment's reversal." (*People v. Zamudio* (2008) 43 Cal.4th 327, 358.) "In short, . . . the power of an appellate court asked to assess the sufficiency of the evidence begins and ends with a determination of whether, on the entire record, there is *any* substantial evidence, contradicted or uncontradicted, which will support the decision of the trier of fact." (*In re Ryan N.* (2001) 92 Cal.App.4th 1359, 1373.)

"Rape is an act of sexual intercourse . . . with a person not the spouse of the perpetrator . . . [¶] . . . [¶] . . . accomplished against a person's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the person or another." (§ 261, subd. (a)(2).) "[A] conviction may be upheld if there is substantial evidence the act was accomplished against the victim's will *either* by force, violence, duress, menace, *or* fear of bodily harm." (*People v. Hale* (2012) 204 Cal.App.4th 961,

976.) Rape is a general intent crime. Performing the proscribed act is enough to violate the law. (*People v. Osband* (1996) 13 Cal.4th 622, 685–686.)

"[T]he crime of unlawful sexual penetration requires the specific intent to gain sexual arousal or gratification or to inflict abuse on the victim. However, as long as [an act of sexual] penetration is done with this specific intent, and that act is 'accomplished against the victim's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person' (§ 289, subd. (a)(1)(A)), the crime has been committed. This is so regardless of whether the force, violence, duress, menace, or fear is also used with the intent to gain sexual arousal or gratification or to inflict abuse on the victim." (*People v. McCoy* (2013) 215 Cal.App.4th 1510, 1538.) "Although resistance is no longer the touchstone of the element of force, the reviewing court still looks to the circumstances of the case, including the presence of verbal or nonverbal threats, or the kind of force that might reasonably induce fear in the mind of the victim, to ascertain sufficiency of the evidence . . . . [Citations.] Additionally, the complainant's conduct must be measured against the degree of force manifested or in light of whether her fears were genuine and reasonably grounded." (*People v. Barnes* (1986) 42 Cal.3d 284, 304.)

We cannot agree with Albizures that no rational jury could have found the requisite general intent.[8] Specifically, he argues Doe did not testify to any "words or conduct on [his] part which showed an intent to overcome her unwillingness by force or fear." Neither the law nor the record support his argument.

In *People v. Iniguez* (1994) 7 Cal.4th 847 (*Iniguez*), our Supreme Court rejected a similar argument. The 22-year-old victim spent the night before her wedding at the home of a close family friend. (*Id.* at p. 851.) Around 1:00 a.m., she awoke when the family friend's fiancé approached her from behind, naked. He "pulled down her pants, fondled her buttocks, and inserted his penis inside her." (*Ibid*.) The victim testified that she

[8] With respect to the digital penetration count, Albizures does not challenge the sufficiency of the evidence establishing his specific intent to gain sexual arousal or gratification.

" 'was afraid, so I just laid there' " frozen. (*Id*. at pp. 851–852.) Several days after the attack, she told the investigating officer that she was afraid that if she said or did anything, the defendant's reaction could be violent. (*Id.* at p. 852.) Despite the defendant's concession that the victim did not consent, the Court of Appeal held that there was insufficient evidence the rape was accomplished by means of force or fear because the defendant " 'did nothing to suggest that he intended to injure [the victim].' " (*Id.* at p. 853.)

Our Supreme Court reversed. (*Iniguez, supra*, 7 Cal.4th at pp. 854–856, 859.) The court noted the fear analysis is comprised of both a subjective and an objective component. (*Id.* at p. 856.) The subjective component "asks whether a victim genuinely entertained a fear of immediate and unlawful bodily injury sufficient to induce her to submit to sexual intercourse against her will." (*Ibid*.) The "extent or seriousness" of the subjective fear is "immaterial" and the victim is not required to articulate "what precisely she feared." (*Id.* at pp. 856–857.) Additionally, " '[t]he kind of physical force that may induce fear in the mind of a woman is immaterial,' " as even " 'embracing and kissing [a victim] against her will' " could cause her to feel genuine fear. (*Id.* at p. 856.) The objective component "asks whether the victim's fear was reasonable under the circumstances, or, if unreasonable, whether the perpetrator knew of the victim's subjective fear and took advantage of it." (*Id*. at p. 857.) The court held sufficient evidence supported the jury's finding that the victim's fear was genuine and reasonable. She demonstrated genuine fear through her statements that she was so afraid that defendant would "do something violent," that she was unable to fight back or voice her objection. (*Id.* at p. 857.) She was also visibly distraught after the attack. (*Id.* at pp. 857–858.) Her fear was reasonable because a "[s]udden, unconsented-to groping, disrobing, and ensuing sexual intercourse while one appears to lie sleeping is an appalling and intolerable invasion of one's personal autonomy that, in and of itself, would reasonably cause one to react with fear." (*Id.* at p. 858.) "The jury could reasonably have concluded that under the totality of the circumstances, this scenario, *instigated and choreographed by defendant*, created a situation in which [the victim] genuinely and

reasonably responded with fear of immediate and unlawful bodily injury, *and that such fear allowed him to accomplish sexual intercourse with* [the victim] *against her will.*" (*Id.* at p. 859, italics added & fn. omitted.)

Similar to the victim in *Iniguez,* Doe testified that she was at least half way through a massage, with a trusted massage therapist, dozing on the table with her eyes covered, when Albizures suddenly inserted his fingers into her vagina. Doe responded by pushing Albizures's hand away and saying, "What the fuck?" Doe described being so genuinely afraid that she could not move. After the incident, Doe expressed distress to her cousin and took several showers.

Albizures concedes, "Jane Doe described digital penetration that took her by surprise and against her will, but her version recounted only a sexual battery, for she said nothing about [Albizures] doing any action to induce unwilling compliance. In fact, she felt free to push his hand away immediately and did so, and that was the end of the [digital] penetration." That a defendant does not apply additional force to continue penetration after the victim objects "does not eliminate his culpability for his initial penetration . . . against her will by use of force." (*People v. Griffin* (2004) 33 Cal.4th 1015, 1029.) He also asserts, "The narrative would be identical if [Albizures's] intent were to see if a sexual advance would be accepted and backed off when he was rebuffed, with no intention to accomplish the act by force or fear." The argument is not persuasive. No reasonable person could characterize a sudden and unannounced digital penetration in the middle of a massage, when the victim is lying nude and asleep, with her eyes covered, as a mere "sexual advance" that the victim would feel free to either accept or rebuff without fear. Doe's fear was a reasonable reaction to Albizures's actions. Just as in *Iniguez,* Doe suffered a "sudden, unconsented-to groping," which was clearly sufficient in and of itself to reasonably cause her to feel fear. (*Iniguez, supra,* 7 Cal.4th at p. 858.)

By intentionally committing these acts, Albizures demonstrated his intent to overcome Doe's will by fear.[9]

There is also substantial evidence Albizures intended to use force to overcome Doe's will. " '[T]he law of rape primarily guards the integrity of a woman's will and the privacy of her sexuality from an act of intercourse undertaken without her consent. Because the fundamental wrong is the violation of a woman's will and sexuality, the law of rape does not require that "force" cause physical harm. Rather, in this scenario, "force" plays merely a supporting evidentiary role, as necessary only to insure an act of intercourse has been undertaken against a victim's will.' " (*People v. Griffin, supra*, 33 Cal.4th at p. 1025.) "The Legislature has never sought to circumscribe the nature or type of forcible conduct that will support a conviction of forcible rape, and indeed, the rape case law suggests that even conduct which might normally attend sexual intercourse, when engaged in with force sufficient to overcome the victim's will, can support a forcible rape conviction." (*Id.* at p. 1027.)

Substantial evidence supports the jury's verdicts. Albizures knew Doe had multiple sclerosis. Doe described feeling Albizures's other hand on her wrist at the time of the digital penetration. When Doe pushed Albizures's hand away, she felt tension in his wrist, concluded that he was making a fist and might strike her. Notwithstanding Doe's having pushed his hand away and saying, "What the fuck?," Albizures proceeded

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[9] In his reply brief, Albizures suggests that *Iniguez* is not relevant to intent, arguing that "evidence of Doe's fear does not show [his] mental state." Albizures suggests that, in order to convict a defendant of rape, the prosecution has the burden to show the defendant knew of the victim's fear. But, he points to no authority for this position. In fact, the law is to the contrary. Only when a victim's fear is unreasonable must the People show the defendant knew of the victim's fear and took advantage of it. (*Iniguez, supra*, 7 Cal.4th at p. 857 [objective prong "asks whether the victim's fear was reasonable under the circumstances, *or, if unreasonable*, whether the perpetrator knew of the victim's subjective fear and took advantage of it"].) The *Iniguez* court did not need to reach the question of whether the perpetrator knew of the victim's subjective fear because the victim's fear was reasonable. (*Id.* at pp. 857, 858–859.) Here, too, the jury did not need to reach that issue.

to pick up her hand and place it on his penis after which she quickly removed her hand. Then, Albizures got on top of the table and "push[ed] himself inside" of her. Doe pushed down on Albizures's shoulders and said, "get out of me," but he continued to thrust. We need not address Albizures's arguments regarding the insufficiency of Doe's attempts to resist once sexual intercourse had begun. Resistance is no longer a required element of rape. (*Iniguez, supra,* 7 Cal.App.4th at pp. 854, 858.)

B. *Exclusion of Doe's Prior Offense*

Outside the presence of the jury, the defense made an offer of proof that it could show, in 1998, Doe entered a Nordstrom store, selected approximately $200–300 worth of merchandise inside the store without paying, and then attempted to return the items for cash. She was prosecuted and ultimately subject to successful diversion. Defense counsel argued Doe's offense was admissible, under *People v. Wheeler* (1992) 4 Cal.4th 284 (*Wheeler*), to impeach Doe's credibility.[10] The prosecutor argued: "[The evidence is] overly prejudicial under Evidence Code section 352, even had she suffered a prior conviction. But she didn't, she successfully diverted. It's 15 or 16 years old. I think that's too old, especially given that she has successfully completed the diversion program, for it to be allowed in this trial."

The court excluded the evidence. It explained: "We all know [this is a crime of moral turpitude]. And then the issue is to determine whether it should be allowed in. Specifically one of the issues is the remoteness, that this is 15 years old, that this happened when Jane Doe was 20 years old or thereabouts, whether it reflects on honesty or integrity and certainly that is why it would be allowed in. [¶] And the factors the Court needs to decide is whether the probative value is substantially outweighed by the

[10] In *Wheeler*, our Supreme Court held Proposition 8's "Truth-in-Evidence" amendment to the Constitution (Cal. Const., art. I, former § 28, subd. (d)) abrogated the statutory rule (Evid. Code, §§ 787, 788), which provided that only felony convictions were admissible to impeach a witness's credibility. (*Wheeler, supra,* 4 Cal.4th at p. 288, superseded on other grounds as stated in *People v. Duran* (2002) 97 Cal.App.4th 1448, 1459–1460.)

probability of prejudice, confusion or undue time consumption. I don't believe that time consumption was an issue because I think both counsel indicated that if it were allowed in she would admit to it. But I am concerned about the remoteness in time, I am concerned about the fact that this is a misdemeanor. And certainly the *Wheeler* case does allow this to come in for misdemeanor conduct, but I think the length of time that has passed and that there has been no other criminal issues that the Court is going to exclude it under the 352 analysis."

Albizures contends the trial court abused its discretion because these factors went only to the weight of the evidence, not its admissibility. He maintains, "[T]he jury was as capable as anyone else of taking into account the remoteness of the event and recognize what it did and did not show."

Past criminal conduct involving moral turpitude that has some logical bearing on the credibility of a witness is admissible for impeachment purposes. (*People v. Castro* (1985) 38 Cal.3d 301, 314; *People v. Ardoin* (2011) 196 Cal.App.4th 102, 120, fn. 7.) "Although *Wheeler*, *supra*, 4 Cal.4th 284, allows for impeaching a witness in a criminal case with evidence of moral turpitude, it cautions that trial courts should consider with 'particular care' whether to allow such evidence." (*People v. Sapp* (2003) 31 Cal.4th 240, 289–290.) "[C]riminal courts [have] broad discretion to admit or exclude acts of dishonesty or moral turpitude 'relevant' to impeachment[.]" (*Wheeler*, at p. 288.) " 'The constitutional right of confrontation includes the right to cross-examine adverse witnesses on matters reflecting on their credibility.' [Citation.] . . . [¶] ' "But in the exercise of this right, the accused, as is required of the State, must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence." ' " (*Ardoin*, at p. 118.) " 'In particular, notwithstanding the confrontation clause, a trial court may restrict cross-examination of

an adverse witness on the grounds stated in Evidence Code section 352.' "[11] (*Id.* at p. 119.)

We review the trial court's Evidence Code section 352 determination for abuse of discretion. (*People v. Ardoin*, *supra*, 196 Cal.App.4th at p. 121.) " 'To constitute an abuse of discretion, . . . the court [must exceed] the bounds of reason, all of the circumstances being considered. [Citation.] In most instances the appellate courts will uphold the exercise of discretion even if another court might have ruled otherwise.' [Citations.] ' "The weighing process under [Evidence Code] section 352 depends upon the trial court's consideration of the unique facts and issues of each case, rather than upon mechanically automatic rules. . . ." ' " (*Ibid.*) "This discretion is not, however, unlimited, especially when its exercise hampers the ability of the defense to present evidence. While the trial judge has broad discretion to control the ultimate scope of cross-examination, wide latitude should be given to cross-examination designed to test the credibility of a prosecution witness in a criminal case." (*People v. Cooper* (1991) 53 Cal.3d 771, 816.)

"When determining whether to admit a prior conviction for impeachment purposes, the court should consider, among other factors, whether it reflects on the witness's honesty or veracity, whether it is near or remote in time, whether it is for the same or similar conduct as the charged offense, and what effect its admission would have on the defendant's decision to testify." (*People v. Clark* (2011) 52 Cal.4th 856, 931.) "When the witness subject to impeachment is not the defendant, those factors prominently include whether the conviction (1) reflects on honesty and (2) is near in time." (*People v. Clair* (1992) 2 Cal.4th 629, 654.)

Doe's prior offense does give rise to a reasonable inference that she, as a person culpable for a misdemeanor showing intent to deceive, is more likely to testify falsely

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[11] "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (Evid. Code, § 352.)

than a witness without a similar history. The probative value of that offense, however, is diminished greatly by the fact that it occurred 15 or 16 years before trial, when Doe was 20, and that she has apparently suffered no subsequent arrests. Albizures concedes that the probative value of Doe's prior offense was limited.

Instead, Albizures maintains that the trial court did not identify a countervailing interest that outweighs the "somewhat weak" probative value of the evidence. Like in *Wheeler*, *supra*, 4 Cal.4th 284, "[t]his was not a case in which the prosecution sought to impeach an *accused* witness with evidence of her prior crimes. Hence, there was no danger that the prior-crimes evidence would create unfair prejudice on the issue of guilt or innocence." (*Id.* at p. 297, fn. 9.) Nonetheless, Albizures is incorrect in asserting that only a testifying defendant can suffer undue prejudice when impeached with prior criminal conduct. (See *People v. Filson* (1994) 22 Cal.App.4th 1841, 1851, overruled on other grounds by *People v. Martinez* (1995) 11 Cal.4th 434, 452 ["When [Evidence Code] section 352 speaks of excluding evidence having 'substantial danger of undue prejudice' it looks to situations where evidence may be misused by the jury"]; *People v. Phillips* (1985) 41 Cal.3d 29, 49–51 [evidence of witness's involvement in prostitution properly excluded because of "obvious potential for embarrassing or unfairly discrediting" the witness]; *People v. Hillhouse* (2002) 27 Cal.4th 469, 496 ["the court is not required to admit evidence . . . 'that merely makes the victim of a crime look bad' "].) The trial court made clear that the probative value of Doe's prior offense was outweighed because it was remote in time and not followed by other wrongdoing.

In *People v. Clair, supra,* 2 Cal.4th 629, our Supreme Court upheld a similar determination. (*Id.* at p. 655.) The trial court had excluded evidence that an important prosecution witness had suffered, 22 years before trial, a felony conviction for voluntary manslaughter " 'primarily because of the remoteness of time.' " (*Id.* at pp. 654–655.) The *Clair* court found no abuse of discretion, explaining: "It was altogether reasonable for the court to conclude that the conviction was 'highly prejudicial' and only 'marginally relevant' 'because of the remoteness of time.' Surely, another court might have concluded otherwise. That fact, however, reveals nothing more than that a reasonable

difference of opinion was possible. Certainly, it does not establish that the court here 'exceed[ed] the bounds of reason . . . .' " (*Id.* at p. 655.)

Doe's offense was similarly remote and represented a "single lapse." (See *People v. Hinton* (2006) 37 Cal.4th 839, 888 [evidence a witness committed series of crimes more probative of credibility than "single lapse"].) The trial court did not abuse its discretion in excluding the evidence. Nor did the trial court's ruling violate Albizures's Sixth Amendment right of confrontation. The confrontation clause "guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." (*Delaware v. Fensterer* (1985) 474 U.S. 15, 20.)

C. *Consciousness of Guilt Instruction*

Next, Albizures contends the trial court erred in giving a purportedly "biased" consciousness of guilt instruction, which unfairly emphasized the inconsistencies in his statements but did not also highlight Doe's inconsistencies or his "consciousness-of-innocence" behavior. Over defense counsel's objection, the trial court instructed the jury, per CALCRIM No. 362: "If the defendant made a false or misleading statement before this trial relating to the charged crime, knowing the statement was false or intending to mislead, that conduct may show he was aware of his guilt of the crime and you may consider it in determining his guilt. [¶] If you conclude that the defendant made the statement, it is up to you to decide its meaning and importance. However, evidence that the defendant made such a statement cannot prove guilt by itself." [12]

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[12] Defense counsel objected that the instruction "unfairly tilts the playing field in favor of the People." If the court was inclined to give the instruction, defense counsel requested it "add a paragraph . . . saying if you find that a Prosecution witness made a false or misleading statement the conduct may show that he or she was aware of the defendant's innocence of the crime." The trial court overruled the objection, saying "other instructions deal with the witnesses that are not on trial."

Consistent with CALCRIM Nos. 105 and 226, the jury was also instructed: "You alone must judge the credibility or believability of the witnesses. . . . [¶] In evaluating a witness's testimony you may consider anything that reasonably tends to prove or disprove the truth or accuracy of that testimony. Among the factors that you may

Albizures's claim lacks merit. Our Supreme Court has repeatedly upheld a predecessor instruction against the charge it was argumentative or lessened the prosecution's burden of proof. (*People v. McWhorter* (2009) 47 Cal.4th 318, 377; *People v. Page* (2008) 44 Cal.4th 1, 49–52; *People v. Jackson* (1996) 13 Cal.4th 1164, 1223–1224, abrogated on another point as stated in *McGee v. Kirkland* (C.D.Cal. 2009) 726 F.Supp.2d 1073, 1080; *People v. Kelly* (1992) 1 Cal.4th 495, 531–532.) "The inference of consciousness of guilt from willful falsehood or fabrication or suppression of evidence is one supported by common sense, which many jurors are likely to indulge even without an instruction." (*People v. Holloway* (2004) 33 Cal.4th 96, 142.) "The cautionary nature of [CALJIC No. 2.03] benefits the defense, admonishing the jury to circumspection regarding evidence that might otherwise be considered decisively inculpatory." (*Jackson*, at p. 1224.) Thus, such an instruction does not "improperly endorse the prosecution's theory or lessen its burden of proof." (*Ibid.*)

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consider are: How well could the witness, see, hear or otherwise perceive the things about which the witness testified? [¶] How well was the witness able to remember and describe what happened? [¶] What was the witness's behavior while testifying? [¶] Did the witness understand the questions and answer them directly? [¶] Was the witness's testimony influenced by a factor such as bias or prejudice, a personal relationship with someone involved in the case or a personal interest in how the case is decided? [¶] What was the witness's attitude about the case or about testifying? [¶] *Did the witness make a statement in the past that is consistent or inconsistent with his or her testimony?* [¶] How reasonable was the testimony when you consider all the other evidence in the case? [¶] Did the witness admit to being untruthful? [¶] Did other evidence prove or disprove any fact upon which the witness testified? [¶] Has the witness engaged in other conduct that reflects on his or her believability? [¶] *Do not automatically reject testimony just because of inconsistencies or conflicts. Consider whether the differences are important or not. People sometimes honestly forget things or make mistakes about what they remember*. . . . [¶] If you do not believe a witness's testimony that he or she no longer remembers something, that testimony is inconsistent with the witness's earlier statement on that subject. [¶] *If you decide that a witness deliberately lied about something significant in this case, you should consider not believing anything a witness says. Or, if you think the witness lied about some things, but told the truth about others, you may simply accept the part that you think is true and ignore the rest.*" (Italics added.)

"Although there are minor differences between CALJIC No. 2.03 and CALCRIM No. 362," this line of authority has been extended to similar challenges to CALCRIM No. 362. (*People v. McGowan* (2008) 160 Cal.App.4th 1099, 1104; accord, *People v. Howard* (2008) 42 Cal.4th 1000, 1021.) We are bound by *People v. Kelly, supra*, 1 Cal.4th 495, and the additional Supreme Court authority. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) We also agree that CALCRIM No. 362 "properly [leaves] it for the jury to determine whether [a prior] statement to police was false or deliberately misleading, and if so, what weight should be given to that evidence." (*McGowan*, at p. 1104.) The trial court did not err in instructing the jury pursuant to CALCRIM No. 362.

D. *CALCRIM Nos. 224 and 225*

Next, Albizures contends the trial court erred by failing to instruct the jury that, " 'to justify a conviction, the facts and circumstances must not only be entirely consistent with the theory of guilt *but must be inconsistent with any other rational conclusion*.' " (*People v. Bender* (1945) 27 Cal.2d 164, 175, italics added (*Bender*), disapproved on other grounds in *People v. Lasko* (2000) 23 Cal.4th 101, 110.) The People contend that Albizures forfeited such an argument when he failed to request a modification of the instructions actually given.[13] Generally, " '[a] party may not argue on appeal that an

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[13] The trial court instructed the jury, per CALCRIM No. 224: "Before you may rely on circumstantial evidence to conclude that a fact necessary to find the defendant guilty has been proved, you must be convinced that the People have proved each fact essential to that conclusion beyond a reasonable doubt. [¶] Also, before you may rely on circumstantial evidence to find the defendant guilty, you must be convinced that the *only reasonable* conclusion supported by the circumstantial evidence is that the defendant is guilty. If you can draw two or more reasonable conclusions from the circumstantial evidence, and one of those reasonable conclusions points to innocence and another to guilt, you must accept the one that points to innocence. However, when considering circumstantial evidence, you must accept only reasonable conclusions and reject any that are unreasonable." (Italics added.)

The trial court also instructed the jury, per CALCRIM No. 225: "The People must prove not only that the defendant did the acts charged, but also that he acted with a particular intent. The instruction for each crime explains the intent required. [¶] An intent

instruction correct in law was too general or incomplete, and thus needed clarification, without first requesting such clarification at trial.' " (*People v. Livingston* (2012) 53 Cal.4th 1145, 1165; accord, *People v. Guiuan* (1998) 18 Cal.4th 558, 570.) Albizures contends he was not required to request clarification because the instructions actually given are not correct in law. (See *People v. Franco* (2009) 180 Cal.App.4th 713, 719 ["rule of forfeiture does not apply, however, if the instruction was an incorrect statement of the law [citation], or if the instructional error affected the defendant's substantial rights"].) We disagree.

We review the trial court's jury instructions independently. (*People v. Guiuan, supra,* 18 Cal.4th at p. 569.) " 'In considering a claim of instructional error we must first ascertain what the relevant law provides, and then determine what meaning the instruction given conveys. The test is whether there is a reasonable likelihood that the jury understood the instruction in a manner that violated the defendant's rights.' [Citation.] We determine the correctness of the jury instructions from the entire charge of the court, not from considering only parts of an instruction or one particular instruction. [Citation.] The absence of an essential element from one instruction may be cured by another instruction or the instructions taken as a whole. [Citation.] Further, in examining the entire charge we assume that jurors are ' " ' "intelligent persons and

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may be proved by circumstantial evidence. [¶] Before you may rely on circumstantial evidence to conclude that a fact necessary to find the defendant guilty has been proved, you must be convinced that the People have proved each fact essential to that conclusion beyond a reasonable doubt. [¶] Also, before you may rely on circumstantial evidence to conclude that the defendant had the required intent, you must be convinced that the *only reasonable* conclusion supported by the circumstantial evidence is that the defendant had the required intent. If you can draw two or more reasonable conclusions from the circumstantial evidence, and one of those reasonable conclusions supports a finding that the defendant did have the required intent and another reasonable conclusion supports a finding that the defendant did not, you must conclude that the required intent was not proved by the circumstantial evidence. However, when considering circumstantial evidence, you must accept only reasonable conclusions and reject any that are unreasonable." (Italics added.)

capable of understanding and correlating all jury instructions which are given." ' " ' " (*People v. Smith* (2008) 168 Cal.App.4th 7, 13.)

Albizures points to language found in CALJIC No. 2.01, but not the CALCRIM instructions. CALJIC No. 2.01 provides: "However, a finding of guilt as to any crime may not be based on circumstantial evidence unless the proved circumstances are not only (1) consistent with the theory that the defendant is guilty of the crime, but (2) *cannot be reconciled with any other rational conclusion*. [¶] Further, each fact which is essential to complete a set of circumstances necessary to establish the defendant's guilt must be proved beyond a reasonable doubt. In other words, before an inference essential to establish guilt may be found to have been proved beyond a reasonable doubt, each fact or circumstance on which the inference necessarily rests must be proved beyond a reasonable doubt. [¶] Also, if the circumstantial evidence [as to any particular count] permits two reasonable interpretations, one of which points to the defendant's guilt and the other to [his] [her] innocence, you must adopt that interpretation that points to the defendant's innocence, and reject that interpretation that points to [his] [her] guilt. [¶] If, on the other hand, one interpretation of this evidence appears to you to be reasonable and the other interpretation to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable." (Italics added.) Albizures maintains the trial court's omission of the italicized language conflicts with authority from our high court. (See *Bender, supra*, 27 Cal.2d at pp. 175, 177.)

Our Supreme Court "has long held that when the prosecution's case rests substantially on circumstantial evidence, trial courts must give 'an instruction *embodying the principle* that to justify a conviction on circumstantial evidence the facts and circumstances must not only be entirely consistent with the theory of guilt but must be inconsistent with any other rational conclusion.' " (*People v. Livingston, supra,* 53 Cal.4th at p. 1167, italics added.) Here, the trial court instructed the jury, "before you may rely on circumstantial evidence to find the defendant guilty, you must be convinced that the only reasonable conclusion supported by circumstantial evidence is that the defendant is guilty." Thus, the trial court fulfilled its obligation to instruct the jury that to

justify a conviction on circumstantial evidence the facts and circumstances must be inconsistent with any other rational conclusion. (*Livingston*, at p. 1167; *Bender, supra*, 27 Cal.2d at pp. 175, 177.)

No reasonable jury would interpret CALCRIM Nos. 224 and 225 in such a way as to allow conviction if it could draw multiple reasonable inferences from the circumstantial evidence, one of which points to innocence. "Words of equal import may be substituted if the principle is substantially but clearly and fairly set forth." (*People v. Navarro* (1946) 74 Cal.App.2d 544, 550.) None of the authority cited by Albizures suggests otherwise. (See, e.g., *People v. Kinowaki* (1940) 39 Cal.App.2d 376, 380 [trial court erred in refusing to give *Bender* instruction or "its equivalent"]; *People v. Koenig* (1946) 29 Cal.2d 87, 93, disapproved on other grounds by *People v. Gould* (1960) 54 Cal.2d 621, 630; *Bender, supra*, 27 Cal.2d at p. 177.) The instructions given correctly stated the law. Accordingly, Albizures forfeited his claim of error.

E. *Cumulative Error*

Finally, Albizures argues that the cumulative effect of the alleged evidentiary and instructional errors requires reversal of the judgment. We have rejected these arguments on the merits. Albizures was entitled to a trial "in which his guilt or innocence was fairly adjudicated." (*People v. Hill* (1998) 17 Cal.4th 800, 844.) He received such a trial.

## III. DISPOSITION

The judgment is affirmed.

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BRUINIERS, J.

WE CONCUR:

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SIMONS, Acting P. J.

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NEEDHAM, J.

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